

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ELLEN E. KIDWELL**  
Claimant

VS.

**GENERAL MOTORS CORPORATION**  
Respondent,  
Self-Insured

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Docket No. 1,000,238

**ORDER**

Claimant appealed the May 12, 2003 Award entered by Administrative Law Judge Robert H. Foerschler. The Board placed this appeal on its summary docket for disposition without oral argument.

**APPEARANCES**

Daniel L. Smith of Overland Park, Kansas, appeared for claimant. Patricia Azinge of Kansas City, Missouri, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

In the May 12, 2003 Award, Judge Foerschler granted claimant permanent partial general disability benefits for a 13 percent whole body functional impairment resulting from a June 30, 2001 accident. In addressing claimant's functional impairment, the Judge mentioned the contents of Dr. Steven L. Hendler's February 24, 2003 medical report, which respondent attached to its submission letter but did not otherwise offer into evidence. The Judge also determined that claimant was entitled to receive 30.14 weeks of temporary total disability benefits, which the Judge found totaled \$12,087.33.

Claimant contends that Judge Foerschler erred. First, claimant argues that Dr. Edward J. Prostic's 16 percent whole body functional impairment rating is reasonable, uncontradicted and conclusive. Second, claimant argues that Dr. Hendler's February 24,

2003 report was not part of the record and should not have been considered by the Judge because the report, which was not requested by the Judge, was not supported by the doctor's testimony and the report was forwarded to the Judge after respondent's terminal date. Third, claimant argues the parties stipulated that claimant was entitled to receive 13.3 weeks of temporary total disability benefits, which had been paid, and, therefore, the Judge erred by entering a contrary finding. Fourth, claimant argues that respondent paid \$5,333.30 in temporary total disability benefits along with an additional \$6,754.03 that was paid pursuant to a separate accident and disability policy. Claimant contends the \$6,754.03 may not be used to offset claimant's award as that issue was not raised before the Judge and, in addition, a credit or offset is not appropriate for benefits that are paid under a separate disability policy. Accordingly, claimant requests the Board to modify the Award and grant her 66.4 weeks of disability benefits for a 16 percent whole body functional impairment.

Conversely, respondent argues that the Judge did not err in referencing Dr. Hendler's report as the Judge considered it only for purposes of claimant's functional impairment. Respondent agrees that claimant is entitled to receive 13.3 weeks of temporary total disability benefits. But respondent contends that it is entitled to a credit for the \$6,754.03 that was allegedly paid to claimant under its sickness and accident policy. Accordingly, respondent contends the Board should modify the Award to correct the number of weeks of temporary total disability benefits due and order a credit or offset in the sum of \$6,754.03, but respondent requests the Board affirm the 13 percent permanent partial general disability.

The issues before the Board on this appeal are:

1. Is Dr. Hendler's February 24, 2003 report part of the evidentiary record?
2. What is the nature and extent of claimant's injury and disability?
3. Is respondent entitled to receive a credit or offset in the sum of \$6,754.03 for benefits allegedly paid to claimant under a sickness and accident disability policy?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant is a long-term employee of respondent, having worked for the vehicle manufacturer for more than 25 years. On June 30, 2001, claimant fell from an elevated platform while at work, injuring her right knee and right shoulder. The parties stipulated

that claimant's accident arose out of and in the course of her employment with respondent.

Respondent began providing claimant medical treatment, which ultimately entailed right knee surgery and right shoulder surgery. On July 31, 2001, Dr. Gregory Barnhill performed right knee surgery to debride the patella and medial femoral condyle. Later, in either late June or late July 2002, Dr. Craig Satterlee performed right shoulder surgery to repair tears in the biceps tendon and rotator cuff. During that surgery, the doctor also performed a subacromial decompression and excised part of the clavicle.

Following the June 2001 accident, claimant was off work until sometime in November 2001, when Dr. Barnhill released claimant from treatment. But claimant's right shoulder symptoms did not resolve and eventually, in either early June or early July 2002, claimant began treating with Dr. Satterlee, who performed the shoulder surgery mentioned above.

At the regular hearing, the parties represented to Judge Foerschler that respondent had previously paid claimant \$12,087.33 in temporary total disability benefits. The parties also agreed that claimant was entitled to receive \$401 per week, which was the maximum weekly benefit for claimant's accident. At that hearing, the Judge and counsel in discussing the potential issues in this claim stated, in part:

JUDGE FOERSCHLER: The other elements of compensability such as whether she was an employee and they were under the Kansas jurisdiction and whether written claim was made is not contested, and of course, General Motors is virtually self-employed *[sic]* particularly for workers' compensation insurance. **She was entitled to the maximum weekly benefit of \$401 but we didn't know exactly how many weeks of temporary total she received.**

MR. SHIELDS: I have all that, your Honor, on -- the adjustor with NBC according to her records there was medical paid, \$34,504.74 **and the temporary total disability totaled \$12,087.33.**

JUDGE FOERSCHLER: Was that actually temporary total disability or was that short-term disability or is that the amount they are claiming for temporary total?

MR. SMITH: I believe it's TT.

MR. SHIELDS: That was TTD.

MR. SMITH: It was paid in two different components.

MR. SHIELDS: That was for period 6/25/02 through 9/26/02 and her return to work date was 9/27/02.<sup>1</sup> (Emphasis added.)

In her regular hearing testimony, claimant clarified that the period from June 25, 2002, through September 26, 2002, represented the period that she was off work for her shoulder. Other than claimant's testimony that she returned to work sometime in November 2001 following the June 2001 accident, the record does not otherwise identify the period that claimant was initially off work following the accident and the right knee surgery.

In attempting to prove the nature and extent of claimant's injuries, claimant's counsel deposed board-certified orthopedic surgeon Dr. Edward J. Prostic. At her attorney's request, claimant first saw Dr. Prostic in December 2001. Although the doctor rated claimant's functional impairment in December 2001, the doctor recommended that claimant have right shoulder surgery.

Dr. Prostic saw claimant a second time in January 2003, after claimant had undergone, and had recovered from, right shoulder surgery. According to the doctor, the findings from claimant's right shoulder surgery established that he had initially underestimated the damage to claimant's shoulder. The doctor testified, in part:

Q. (Mr. Smith) Now, following the surgery on her left *[sic]* -- on her shoulder and your examination in January of this year, did you find that she indeed had more going on with her shoulder at surgery than you had previously thought there was going on?

A. (Dr. Prostic) The findings were quite different from what I predicted.

Q. What did they find at surgery on that shoulder?

A. There were partial thickness tears of the rotator cuff, both from the bursal side, from impingement, and on the articular side, and there was significant damage to the biceps tendon.

Q. Would it be fair to say, Doctor, that the injury to her shoulder was more extensive upon surgical exploration than you had initially anticipated?

A. Yes.<sup>2</sup>

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<sup>1</sup> R.H. Trans. at 4-5.

<sup>2</sup> Prostic Depo. at 8-9.

Based upon the January 2003 examination and the information that the doctor had obtained regarding the shoulder surgery, Dr. Prostic rated claimant under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.) as having a 12 percent functional impairment to the leg and a 20 percent functional impairment to the right upper extremity at the shoulder, which combined for a 16 percent whole body functional impairment.

Dr. Prostic's 16 percent whole body functional impairment rating was higher than the 13 percent whole body functional impairment rating that the doctor had given in December 2001. At that time, the doctor had rated the impairment to the right leg at 10 percent and the impairment to the right upper extremity at 15 percent. In explaining the reasons that his rating increased, the doctor stated:

Well, the most simple answer is that arthroplasty via acromioclavicular joint is 10 percent in the AMA Guides. So that added to her shoulder arthroscopy, which I didn't predict, allows me to go up 10 percent of the rating. I didn't feel that I should go up that much because the findings within the glenohumeral area were different than I predicted. Instead of having a SLAP lesion, she required the biceps tenosynovitis [sic] and the debridement of the rotator cuff. So the shoulder condition that was found by Dr. Satterlee at surgery was completely different than I expected and different surgery was performed from what I expected.

At the knee, she made less progress than I would have predicted. Her atrophy decreased from one-half inch to three-eighths of an inch. That's very little improvement in more than a year of time. It implies that she has a substantial difficulty with her knee that is probably going to be progressive.<sup>3</sup>

Respondent did not present any witnesses to contradict Dr. Prostic's opinions. Nevertheless, respondent attached Dr. Steven L. Hendler's February 24, 2003 medical report to its submission letter that it filed with the Judge. Moreover, in its brief to this Board respondent attached copies of medical records from Dr. Satterlee that were never offered into evidence.

**1. Is Dr. Hendler's February 24, 2003 report part of the evidentiary record?**

The Board concludes that Dr. Hendler's February 24, 2003 report is not part of the evidentiary record and, therefore, should not be considered for any purpose in this claim.

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<sup>3</sup> *Id.* at 12-13.

The general rule is that medical reports that are not supported by the author's testimony may not be considered as part of the evidentiary record. K.S.A. 44-519 provides:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

There are, however, exceptions to that general rule. Administrative regulations provide that medical reports may be considered as evidence when the parties agree to their admission.<sup>4</sup> Moreover, when a judge requests the medical report, that information may then be considered in determining the final award.<sup>5</sup>

Because claimant has not agreed to the admission of Dr. Hendler's report and respondent has failed to establish that the document should be considered part of the record under either the administrative regulation or statute, the report should not be considered in determining claimant's award.

Respondent's reliance upon the *McKinney*<sup>6</sup> decision is misplaced as that case dealt with a medical report that had been prepared by a doctor who was appointed by an administrative law judge to perform an independent medical examination and to report the findings from that examination.

## **2. What is the nature and extent of claimant's injury and disability?**

The Board concludes that claimant has sustained a 16 percent whole body functional impairment due to the June 2001 accident. Dr. Prostic's testimony is uncontradicted. Moreover, Dr. Prostic explained why claimant's functional impairment rating increased from the 13 percent whole body functional impairment rating that the doctor found in December 2001 to the 16 percent whole body functional impairment rating that he found in January 2003. The doctor's explanation is reasonable and credible.

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<sup>4</sup> K.A.R. 51-3-5a.

<sup>5</sup> See K.S.A. 44-510e and K.S.A. 44-516.

<sup>6</sup> *McKinney v. General Motors Corp.*, 22 Kan. App. 2d 768, 921 P.2d 257 (1996).

Although Dr. Prostic was able to combine the functional impairment ratings from claimant's right upper and lower extremity injuries and convert those ratings to a whole body functional impairment, claimant's permanent disability award should be calculated based upon two separate scheduled injuries.<sup>7</sup> Consequently, under K.S.A. 44-510d claimant is entitled to receive permanent disability benefits for a 12 percent functional impairment to the leg and a 20 percent functional impairment to the upper extremity at the shoulder level.

**3. Is respondent entitled to receive a credit or offset in the sum of \$6,754.03 for benefits allegedly paid to claimant under a sickness and accident disability policy?**

At the regular hearing, the parties agreed that claimant was paid \$12,087.33 in temporary total disability benefits. The Judge divided that sum by \$401, which was the maximum temporary total disability rate for this accident, and determined that claimant had been paid 30.14 weeks of temporary total disability benefits.

According to claimant's testimony, she was initially off work following the accident through sometime in November 2001. Therefore, claimant was off work more than the period from June 25, 2002, through September 26, 2002, that respondent's counsel specifically referenced at the regular hearing. A close review of the record indicates that there is no evidence that claimant received any weekly compensation from respondent other than temporary total disability benefits while she was off work. Moreover, the assertion that claimant also received benefits from a sickness and disability policy in addition to temporary total disability benefits did not arise until claimant filed her brief with this Board in May 2003.

The Board finds and concludes that the Judge did not err in estimating the period that claimant was entitled to receive temporary total disability benefits as that estimate was based upon the parties' representations. Consequently, the Board affirms the Judge's order that claimant is entitled to receive 30.14 weeks of benefits at \$401 per week.

Claimant's argument that the parties stipulated that only 13.3 weeks of temporary total disability benefits were due and owing is disingenuous. As quoted above, at the regular hearing respondent's counsel indicated that temporary total disability benefits were paid in "two components" but respondent's attorney then only recited the period that claimant was off work for the shoulder surgery and did not recite the period that claimant was initially off work immediately following the accident as claimant later testified.

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<sup>7</sup> See *Pruter v. Larned State Hospital*, 28 Kan. App. 2d 302, 16 P.3d 975 (2000), *aff'd* 271 Kan. 865, 26 P.3d 666 (2001).

Moreover, at the regular hearing claimant's counsel specifically agreed that the \$12,087.33 amount had been paid to claimant as temporary total disability benefits.

On the other hand, respondent's argument that it is entitled to a credit for payment of benefits under a separate accident and sickness policy is equally without merit. There is no evidence in the record that claimant received any such payment under any such policy. Furthermore, that request or issue was not presented to the Judge. Respondent first raised this issue in its brief to this Board in July 2003.

For future reference, counsel are directed to cite the record where their alleged facts may be found. Likewise, counsel are directed to limit their comments to evidence that is in the record. And in those rare instances where necessary, only exhibits that are admitted into evidence should be attached to the parties' briefs.

### **AWARD**

**WHEREFORE**, the Board modifies the May 12, 2003 Award. The Board awards claimant permanent disability benefits for a 12 percent functional impairment to the right lower extremity and a 20 percent functional impairment to the right upper extremity at the shoulder level.

Ellen E. Kidwell is granted compensation from General Motors Corporation for a June 30, 2001 accident and resulting disability. For the right lower extremity injury, Ms. Kidwell is entitled to receive 16.71 weeks of temporary total disability benefits at \$401 per week, or \$6,700.71, plus 21.99 weeks of permanent partial disability benefits at \$401 per week, or \$8,817.99, for a 12 percent functional impairment to the right lower extremity. For the right upper extremity injury at the shoulder level, Ms. Kidwell is entitled to receive 13.43 weeks of temporary total disability benefits at \$401 per week, or \$5,385.43, plus 42.31 weeks of permanent partial disability benefits at \$401 per week, or \$16,966.31, for a 20 percent functional impairment to the right upper extremity at the shoulder level. The total award is \$37,870.44, which is all due and owing less any amounts previously paid.

The remaining orders set forth in the Award are adopted by the Board to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**



Dated this \_\_\_\_ day of August 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant  
Patricia Azing, Attorney for Respondent  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director